SHYAM ISHTA PUTHUCHEARY A

v.

RAJVEER SINGH DHALIWAL

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM JC
[ORIGINATING SUMMONS NO: F-24-140-2010]
18 APRIL 2011

CIVIL PROCEDURE: *Appearance - Conditional appearance - Leave to enter conditional appearance out of time - Defendant domiciled in Port Lincoln, Australia - Whether submitted to jurisdiction - Whether having special circumstance to enter appearance - Whether to fully disclosed previous related proceedings - Leave not endorsed on memorandum of conditional appearance - Whether oversight on part of Senior Assistant Registrar - Whether defendant required to serve memorandum of conditional appearance on plaintiff - Rules of the High Court 1980, O. 12 - Practice Note No. 4 of 1980* C D

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Senior Assistant Registrar granted leave to defendant to enter memorandum of conditional appearance - Defendant domiciled in Port Lincoln, Australia - Whether submitted to jurisdiction - Whether defendant had special circumstance for entering appearance out of time - Whether defendant required to fully disclose previous related proceedings - Leave not endorsed on memorandum of conditional appearance - Whether oversight on part of Senior Assistant Registrar - Whether defendant required to serve memorandum of conditional appearance on plaintiff - Rules of the High Court 1980, O. 12 - Practice Note No. 4 of 1980* E F

The plaintiff/wife made this application to set aside the decision of the Senior Assistant Registrar ('SAR') granting leave to the defendant/husband to enter a memorandum of conditional appearance. The defendant, who was resident and domiciled in Port Lincoln, Australia, had applied to the Australian court to have their marriage dissolved, while the plaintiff applied to the Malaysian court to have the matter adjudicated in this country ('encl. 1'). The plaintiff also sought for an injunction against the defendant from enforcing any Australian court order on her. The defendant however failed to enter conditional appearance on time and consequently encl. 1 was fixed for *inter partes* hearing and the G H I

injunction was granted against him. The defendant then applied for leave to enter memorandum of conditional appearance ('encl. 24') substantively on grounds that he was outside the jurisdiction of the Malaysian court, and this was granted. The leave however was not endorsed on the memorandum of conditional appearance. The defendant then applied to set aside encl. 1 and the injunction. The plaintiff contended that in an earlier proceeding concerning the maintenance and custody of their children ('first OS') the defendant did not raise the issue of jurisdiction and therefore he had waived his rights to raise it again. The issues to be determined were: (i) whether the defendant had submitted to jurisdiction; (ii) whether the defendant had special circumstance for entering his conditional appearance out of time; (iii) whether the defendant was required to fully disclose facts regarding the first OS; (iv) whether the defendant had complied with the terms of the Practice Note No. 4 of 1980 or O. 12 r. 3 Rules of the High Court 1980 ('RHC'); and (v) whether the defendant had to serve the memorandum of conditional appearance on the plaintiff.

Held (dismissing the plaintiff's application):

(1) The defendant was not precluded from raising the issue that he was outside the jurisdiction of the courts, even though he had did not raise the matter in the first OS. This was because the first OS *ie*, the custody and maintenance of their children and encl. 1 *ie*, the dissolution of their marriage were filed separately by the plaintiff, applying for two separate reliefs. Furthermore, the two cases were never consolidated for the purposes of a joint hearing. (para 16)

(2) It was clear that the defendant had special circumstance for entering his conditional appearance out of time. He was at a remote area and was given very little time *ie*, eight days to appoint a suitable counsel to defend him. He also needed assistance to prepare the affidavit in the Malay language and to affirm it before an appropriate Commissioner for Oaths. It was in the interest of justice that the defendant was granted the leave to enter his conditional appearance. (paras 35 & 38)

(3) The plaintiff was fully aware of the proceedings in the first OS which was later heard inter partes by this court. The defendant was not required to fully disclose the fact that there was an earlier proceeding in this court *ie*, the first OS or that he had a Malaysian address for the purpose of his affidavits for the first OS. (para 43)

(4) It was the responsibility of the counsel for the defendant to endorse the leave in the memorandum of conditional appearance in compliance with Form 16 of the RHC. Then it was the duty of the SAR to sign the portion of the memorandum in accordance with Form 16. It was the oversight of the SAR not to sign the memorandum of conditional appearance and sealed it. The defendant should not be faulted or prejudiced by it. Since on record there was proof of filing by the defendant, *ie*, the court's stamp as well as receipt of payment of the filing fees, this was accepted as a valid document. (paras 47 to 49)

(5) The matter of conditional appearance was specifically provided for in O. 12 rr. 6 and 7 RHC where Form 16 was used. The rules did not require the defendant to serve the memorandum of conditional appearance on the plaintiff. Once the SAR had granted leave, it should be followed by prompt action *ie*, to apply to set aside the plaintiff's application of encl. 1, which the defendant did. (para 51)

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 2 r. 2, O. 12 rr. 3, 6(1), 7(1), O. 92 r. 4

For the plaintiff - Kiran Dhaliwal (YN Foo with him); M/s YN Foo & Partners
For the defendant - Jaspal Singh; M/s Sekar Gill & C Suren

Reported by Melinda Robert

JUDGMENT

Yeoh Wee Siam JC:

Appeal

[1] This is my judgment for encl. 37 heard *inter partes* by me in chambers on 18 March 2011.

Enclosure 37

[2] Enclosure 37 is the plaintiff's application filed by way of a summons in chambers ("SIC") for the following reliefs:

A 1. that pursuant to O. 2 r. 2 of the Rules of the High Court 1980 ("the RHC") the leave to enter conditional appearance which was granted to the defendant by the Senior Assistant Registrar ("the SAR") on 2 December 2010 (encl. 24) be set aside.

B 2. that the SIC to set aside the originating summons ("the OS") (encl. 29) and the SIC to set aside the order dated 15 October 2010 (encl. 32) be stayed pending the decision of this application.

C 3. that the defendant be ordered to pay the costs of this application.

4. other relief as deemed just by the court.

D **Background Facts**

[3] Enclosure 1 is the plaintiff's OS applying, *inter alia*, for a declaration that all matters regarding the dissolution of marriage of the plaintiff and defendant, division of their assets, and the maintenance and custody of the children be adjudicated and decided by the Malaysian High Court and not by the Australian Federal Magistrates Court. It also prays for an injunction against the defendant and/or his agents from enforcing any Australian Court Order on the same matters.

F **[4]** The cause papers for encl. 1 were served on the defendant on 6 October 2010. The defendant was given eight days to enter appearance ie, on or before 15 October 2010. The defendant failed to do so.

G **[5]** On 8 October 2010 the Defendant's Australian Solicitors wrote to this court seeking an adjournment on 15 October 2010 to enable the defendant to appoint Malaysian Solicitors. This was objected to strongly by the plaintiff's counsel.

H **[6]** On 15 October 2010 the court heard the summons in chambers, fixed for *inter partes* hearing, in the absence of the defendant's counsel, and a court order, including an injunction, was granted against the defendant (encl. 20).

I **[7]** The defendant was granted leave by the SAR on 2 December 2010 (encl. 24) to enter his Memorandum of Conditional Appearance and to apply to set aside encl. 1 and the injunction granted against the defendant on 15 October 2010.

[8] The defendant filed:

(1) the memorandum of conditional appearance on 3 December 2010;

(2) the application to set aside the plaintiff's OS ie, encl. 1 on 3 December 2010 (encl. 29); and

(3) the application to set aside the injunction (granted on 15 October 2010) on 9 December 2010 (encl. 32).

On 5 January 2011 the plaintiff filed this application ie, encl. 37.

Decision On encl. 37

[9] I heard encl. 37 *inter partes* on 18 March 2011 after which I dismissed the plaintiff's application with costs. I then fixed encl. 29 for hearing on 10 May 2011. Both learned counsel agreed with the court that the status of encl. 32 would depend on the outcome of the court's decision on encl. 29.

[10] My reasons for dismissing encl. 37 are as follows:

[11] Learned counsel for the plaintiff submitted that the defendant has already submitted to the jurisdiction of this court, and cannot therefore be seeking leave to enter conditional appearance. She stated that the defendant has submitted to this jurisdiction as follows:

a. by making an application for an extension of time to enter appearance in prayer 1 of encl. 24;

b. by his counsel's appearance in court on 9 November 2010, 26 November 2010 and 2 December 2010; and

c. by his application *vide* encl. 32, that the order of 15 October 2010 be set aside.

Whether The Defendant Has Submitted To The Jurisdiction Of This Court

[12] In his affidavit in support of encl. 24, the defendant clearly stated that he believes he is outside the jurisdiction of this court since he had already relocated to Australia in September 2005. The plaintiff and the three children then moved to Australia to join

A him in April 2006. The defendant averred that he is now domiciled and resident in Port Lincoln, Australia, and has a medical practice there.

[13] Learned counsel for the plaintiff contended that in another
B earlier case before this court ie, OS24-85-2010 ("the 1st OS") the defendant had submitted to the jurisdiction of this court.

[14] The 1st OS was regarding the custody, care and control of the three children, their maintenance and the defendant's access to the children. In that case, the issue of domicile of the
C defendant was never raised by the defendant.

[15] In the present case, the defendant raised the issue that he has not submitted to the jurisdiction of this court, and the issues in this OS are different from the 1st OS. Hence, the reason why
D the defendant applied for leave to file conditional appearance.

[16] I am of the view that even though the defendant had defended the 1st OS, he is not precluded from raising the issue that he is not submitting to the court's jurisdiction in this present
E OS. By defending the 1st OS which presented immediate issues of custody, care and control of the children, and maintenance and access, the defendant did not waive his right to contend that, for the purposes of this OS, he is outside the court's jurisdiction. The two OS cases were filed separately by the plaintiff, applying for
F different reliefs. Moreover, the two cases were never consolidated for the purpose of a joint hearing.

[17] Learned counsel for the plaintiff also submitted that the defendant had submitted to the jurisdiction of this court when his
G counsel appeared in this Honourable Court on 9 November 2010, 26 November 2010 and 2 December 2010.

[18] In actual fact, the following is what happened:

[19] On 9 November 2010 the defendant's solicitor explained to
H the court that he needed to do a file search to ascertain all documents filed against the defendant, before deciding on the next course of action.

[20] On 26 November 2010 the defendant's solicitor informed the
I court that he would be filing three applications ie, the defendant's *ex parte* application for leave to enter conditional appearance, application to set aside the OS, and application to set aside the order of 15 October 2010.

[21] On 2 December 2010 the defendant's solicitor appeared before the SAR for the hearing of the *ex parte* application (encl. 24).

[22] I am of the opinion that the appearance of the defendant's solicitor in court on 9 November 2010, 26 November 2010 and 2 December 2010 does not prove that the defendant has submitted to this court's jurisdiction for this OS. Neither does it mean that by taking steps to file encls. 24, 29 and 32 the defendant is submitting to this court's jurisdiction. On the contrary, from what the defendant's solicitor informed the court on 9 November 2010 and 26 November 2010, and from the very nature of the applications in encls. 24, 29 and 32, it is clear that the defendant's intention is not to submit to the jurisdiction of this court.

Whether The SAR's Leave To Grant Extension Of Time For The Defendant To File Conditional Appearance Should Be Set Aside

[23] The defendant's application for leave to file conditional appearance (encl. 24) was filed under O. 12 r. 6 of the RHC and Practice Note No. 4 of 1980.

[24] Under O. 12 r. 6(1) of the RHC, a defendant may, with the leave of the court, enter conditional appearance in Form 16.

[25] The question is whether the SAR should have granted such leave to the defendant. In this respect, the following issues raised by learned counsel for the plaintiff have to be decided:

(a) Whether The Defendant Has To Apply For Extension Of Time To Enter Conditional Appearance Within The Eight Days Given

[26] Order 12 r. 6 and 7 of the RHC provide specifically for conditional appearance as follows:

> Conditional appearance (O. 12 r. 6)
>
> 6(1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.
>
> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional

A appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.

Application to set aside writ etc (O. 12, r. 7)

B 7(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to C serve the notice on him out of the jurisdiction.

[27] In my opinion, O. 12 r. 6 and 7 of the RHC provide that the defendant has to enter conditional appearance "within the time limited for the purpose" (in this case, eight days). However, the D rules are silent on when the defendant has to apply for extension of time for leave to file conditional appearance. It is not stated whether he should do so within the eight days given to him to enter appearance.

E **[28]** Notes 12.7.1 and 12.7.2 of the "Malaysian Court Practice, High Court" by Malayan Law Journal Sdn. Bhd. 1996 Issue 1 state as follows:

[12.7.1] Scope of the rules

F This rule provides for the defendant to raise any objection on the issue or service of the writ or of the notice of the writ or to the jurisdiction of the court. If he has any such objections, he must apply to set aside such issue or service. The burden is on the defendant to make his objection in due time, otherwise his appearance if conditional will become unconditional, or if he has G entered an appearance, he will be in default of appearance.

[12.7.2] Time for application

He may apply at any time before appearing but before expiry of the time for appearance or otherwise he would be in default of H appearance. If he has entered a conditional appearance, he must do so before 14 days, otherwise his appearance becomes unconditional. ...

[29] According to note 12.7.1 the burden is on the defendant to I make his objection "in due time".

[30] According to note 12.7.2 the defendant may apply at any time before appearing but "before expiry of the time for appearance". A

[31] Therefore, according to notes 12.7.1 and 12.7.2, the defendant has to apply within the eight days to enter appearance. In this case, the defendant failed to do so, which means the defendant was in default of appearance. That is the reason why subsequently he filed the application in encl. 24 ie, for leave to enter conditional appearance after the eight days given, and after an extension of time has been granted by the SAR. B C

[32] I am of the view that notes 12.7.1 and 12.7.2 cover a situation where the defendant is in a position to file a conditional appearance within the time stipulated. However, these 2 notes do not cover a situation as in the present case, namely, where the defendant did not file a conditional appearance within the due time or time for appearance ie, within the eight days given. Notes 12.7.1 and 12.7.2 do not state that once the time for appearance is over, the defendant is precluded from applying for leave for extension of time, beyond the eight days, to enter conditional appearance. This is where the court, in this case the SAR, has the discretionary power to allow the extension of time sought by the defendant. D E

[33] In the 1st OS, the defendant was able to appoint his Malaysian Solicitors within four days of service of the OS. F

[34] In this OS, the defendant is contending that eight days are not sufficient to enter conditional appearance since he is in Port Lincoln, Australia, and he is not appointing the same solicitors as in the 1st OS for the present case. In any case, he appointed his solicitors on 9 November 2010. His Solicitors then came to court on 9 November 2010 and 26 November 2010 to inform the court of the defendant's intention for enter a conditional appearance after a file search has been made. G

[35] It is clear that the defendant had special circumstances for entering his conditional appearance out of time. He is in Port Lincoln, Australia, which is in a remote area. He was given very little time ie, eight days to appoint a suitable counsel to defend him in the present OS. He also needed assistance to prepare his affidavit in the Malay language and to affirm it before an appropriate Commissioner of Oaths. Such resources are available in Canberra, Australia, or in Malaysia. H I

[36] Order 1A of the RHC provides as follows:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[37] Order 92 r. 4 of the RHC provides as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[38] Applying O. 1A and O. 92 r. 4 of the RHC, I am satisfied that, in the special circumstances of the case, the SAR had exercised her discretion judiciously. It is in the interest of justice that the defendant be granted the extension of time and leave enter his conditional appearance.

Whether The Criteria In Practice Note No. 4 Of 1980 Has Been Fulfilled

[39] Under Practice Note No. 4 of 1980 "The leave should be given 'where the defendant shows a *bona fide* desire or ground to raise a question as to the validity of regularity of the proceedings or the jurisdiction of the court'".

[40] The defendant is now residing in Port Lincoln, Australia and not in Malaysia. The issue of his domicile will be considered fully by this court when encl. 29 is heard at a later date. The defendant also informed the court of his pending Australian Court proceedings which were filed before the 1st OS and this OS. The defendant submitted that in the 1st OS, the plaintiff had fled Australia with the three children to circumvent the Australian Court proceedings, and then filed proceedings in this Honourable Court for custody and maintenance. In the present case, the plaintiff's OS is for an order restraining the defendant from proceeding with, and enforcing the Australian Court proceedings as well as an order that he withdraws such proceedings. Clearly, the defendant has shown that he has a *bona fide* desire or ground to raise a question as to the validity or regularity of the proceedings or jurisdiction of the court.

Whether There Is Full Disclosure By The Defendant Of The Court Proceedings In The 1st OS

[41] Learned counsel for the plaintiff submitted, *inter alia*, that the defendant did not provide full and frank disclosure to this court of the proceedings in the 1st OS, as is required in all *ex parte* proceedings. She also submitted that the defendant failed to inform the court that he has a Malaysian address which was used for his affidavits for the 1st OS proceedings.

[42] The 1st OS is regarding the custody, care and control of the 3 children which the court had already decided on. The matter is now pending an appeal by the defendant to the Court of Appeal. The present OS goes beyond the 1st OS and impacts on the Australian Court proceedings which deal with property matters in addition to the dissolution of the marriage, custody and maintenance (see defendant's affidavit in support of encl. 24).

[43] The plaintiff is fully aware of the proceedings in the 1st OS, which OS was later heard inter partes by this court. This court has full knowledge of the proceedings of the 1st OS. Therefore, I do not think that it should be made an issue here that the defendant should fully disclose to this court that there were previous proceedings in this court (ie, regarding the 1st OS), and that the defendant has a Malaysian address here for the purpose of his affidavits for the 1st OS.

Whether The Defendant Has Complied With The Terms Of The Practice Note No. 4 Of 1980, Or O. 12 r. 3 Of The RHC

[44] Practice Note No. 4 of 1980 states that the leave obtained should be endorsed on the memorandum of appearance in duplicate, the original of which shall be filed in the court file and the copy returned to the applicant.

[45] Practice Note No. 4 of 1980 also states that it shall not be necessary for the applicant (in this case, the defendant) to extract the order of the court granting leave to file conditional appearance.

[46] In this case, I note that the leave is not endorsed in the memorandum of conditional appearance. Neither is the memorandum sealed with the court seal or signed by the SAR.

[47] It is the responsibility of counsel for the defendant to endorse the leave in the memorandum of conditional appearance, in compliance with Form 16 of the RHC. Next, it is the duty of the SAR to sign that portion of the memorandum of conditional appearance, in accordance with the format in Form 16.

[48] I am of the view that it is the oversight of the SAR not to sign the memorandum of conditional appearance and seal it. The defendant should not be faulted or prejudiced by it. However, on record, there is proof of filing by the defendant, namely, the court's stamp on the memorandum of conditional appearance (encl. 28) indicating the date, 3 December 2010, and receipt of payment of the filing fees.

[49] In all fairness to the defendant, the court accepts encl. 28 as a valid document.

[50] The question is whether the memorandum of conditional appearance has to be served on the plaintiff's solicitor. Learned counsel for the plaintiff submitted that this is required under O. 12 r. 3 of the RHC.

[51] With respect, I do not agree with her. Order 12 r. 3 of the RHC is regarding unconditional appearance where Form 15 is used. However, the matter of unconditional appearance is specifically provided for in O. 12 r. 6 and 7 of the RHC where Form 16 is used. Nowhere in these rules does it require the defendant to serve the memorandum of conditional appearance on the plaintiff's solicitors. I believe this is a lacuna in the RHC. In any case, it has to be borne in mind that the application for leave to enter conditional appearance is an *ex parte* application, and once granted it must be followed by prompt action (in this case, seven days as granted by the SAR) to apply to set aside the writ (in this case, to set aside the OS), which was duly done by the defendant.

[52] Learned counsel for the plaintiff submitted that the defendant's application in encl. 32 is outside the ambit of a conditional appearance under O. 12 r. 7 of the RHC. Regarding this issue, I am in agreement with her. However, in my view, encl. 32 is a totally separate matter. It is only relevant should the court, at a later date, dismiss the defendant's application to set aside the OS (encl. 29), in which case encl. 32 would automatically be

rendered academic and irrelevant. Suffice, for the purpose of this application, that once leave was granted by the SAR, the defendant proceeded to apply to set aside the OS (encl. 29) in accordance with O. 12 r. 7(1) of the RHC, within the seven days granted.

[53] Based on the above, I therefore ordered accordingly.